SUPREME COURT, U.S.

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IN THE

# Supreme Court of the United States

NO. 902

SHERMAN T. IRWIN, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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SHERMAN T. IRWIN, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

Sherman T. Irwin, Petitioner, prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Texas entered in the above entitled cause on October 16, 1968.

## OPINION OF THE COURT BELOW

The opinion and judgment of the Court of Criminal Appeals of Texas in the above-entitled case is reported as *Irwin v. State of Texas,* ___ S.W.2d ___ (publication being withheld) copy of which is attached as Appendix "A" (pp. 23 to 32).

The judgment of the trial court which was affirmed by the Court of Criminal Appeals is attached as Appendix "B" (pp. 33 to 37).

## GROUNDS OF JURISDICTION

The judgment and decree sought to be reviewed was handed down and entered by the Texas Court of Criminal Appeals on May 15, 1968. The first and second motions for rehearing were timely filed and were finally overruled on October 16, 1968, on which date the judgment became final. These facts are confirmed by certificate of the Clerk of the Court of Criminal Appeals, attached as Appendix "C", p. 38. An order staying issuance of mandate for a period of 90 days in order that Petitioner may apply to the Supreme Court of the United States for writ of certiorari was granted on the 17th day of October, 1968, copy of which is attached as Appendix "D", p. 39.

Jurisdiction of the Supreme Court of the United States of America is invoked under 28 U.S.C.A., Sec. 1257(3).

## QUESTIONS PRESENTED FOR REVIEW

Before the Texas Court of Criminal Appeals, after the decisions by this Supreme Court of the United States in *Marchetti v. United States,* 390 U.S. 39, 88 S.Ct. 697 (1968), and *Grosso v. United States,* 390 U.S. 62, 88 S.Ct. 709 (1968), Petitioner raised the issue that an affidavit for search warrant was unlawfully based on Petitioner's having purchased a Federal wagering occupation Stamp. This ground was not raised at the trial level for the reason that *Marchetti* and *Grosso* had not then been decided.

Petitioner at the trial level moved to suppress evidence on the basis that the affidavit for search warrant was defective for the following reasons:

(a) That all of the statements contained in the affidavit for search warrant were hearsay, hearsay upon hearsay, or multiples of hearsay to the informer and the affiant and therefore was insufficient to establish probable cause; and

(b) That the affiant did not make the affidavit for search warrant in good faith because the affiant during trial admitted he did not believe everything that he swore to in the affidavit for search warrant.

The questions presented are:

I. Whether an affiant may use evidence that Petitioner purchased a Federal Wagering Occupation Stamp to establish probable cause for issuance of a search warrant in light of *Marchetti v. United States,* 390 U.S. 39, 88 S.Ct. 697 (1968), and *Grosso v. United States,* 390 U.S. 62, 88 S.Ct. 709 (1968).

(a) Is compliance with the Federal statute a waiver of a Fifth Amendment defense if the compliance took place prior to the *Marchetti* and *Grosso* decisions in which that defense was first recognized?

II. Whether an affidavit for search warrant which consists only of statements that are hearsay, hearsay upon hearsay, or multiples of hearsay, is sufficient to establish probable cause for issuance of a search warrant as required under the Fourth and Fourteenth Amendments to the Constitution of the United States in light of *Aguilar v. State of Texas,* 378 U.S. 108, 84 S.Ct. 1509, *Giordenello v. United States,* 357 U.S. 480, 78 S.Ct. 1247, and *United States v. Ventresca,* 380 U.S. 102, 85 S.Ct. 741.

III. Whether an affiant who swears in an affidavit for search warrant that the policy paraphernalia is on the

Petitioner's premises at the time of the issuance of the search warrant, and later testifies under oath that he did not believe that most of the policy paraphernalia seized was at the Petitioner's premises at the time the search warrant was issued, constituted lack of good faith as required under the Fourth, and Fourteenth Amendments in light of *Rugendorf v. United States,* 376 U.S. 528, 84 S.Ct. 825.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV to the Constitution of the United States, pertinent provisions of which provide as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures, shall not be violated and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V to the Constitution of the United States, pertinent provisions of which provide as follows:

> "No person shall be held to answer for a capital, or other infamous crime, lest on the presentment or indictment of a grand jury—or be deprived of life, liberty, or property without due process of law."

Amendment XIV, Sec. 1 to the Constitution of the United States, the pertinent provisions of which provide as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Vernon's Texas Penal Code, Article 642(c), Section 1, which provides as follows:

"Any person who shall directly, or as agent, servant, or employee for another, or through any agent, servant, employee, or other person, keep or exhibit for the purpose of gaming, any policy game, shall be guilty of a felony and upon conviction shall be punished by confinement in the State penitentiary for any term of years not less than two (2) nor more than four (4)."

## STATEMENT OF THE CASE

Federal questions were raised in the trial court by the Petitioner's motion to suppress evidence (Tr. 6-15), by Petitioner's motion to disqualify the presiding judge (Tr. 1-3), by Petitioner's objection to the admission of evidence seized as a result of the search of the premises described in the search warrant (S.F. 79-87), and by Petitioner's amended motion for new trial (Tr. 26-28, par. VI and VII). They were raised in the Court of Criminal Appeals, by filing with the Clerk of the said Court a transcript containing the motions to suppress evidence, to disqualify the presiding judge, and for new trial, and by objections made to the introduction of evidence during the trial itself, and by exhaustive briefs on the points followed by two motions for rehearing.

The Petitioner's motion to suppress evidence, Petitioner's motion to disqualify the presiding judge, and the Petitioner's objections to the introduction of evidence

seized as a result of the search of the premises described in the search warrant, duly set up denial of rights guaranteed by the Constitution of the United States, under the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States.

## I.

### Statement of the case relating to use of statement that Petitioner purchased wagering stamps to establish probable cause for issuance of a search warrant.

On February 7, 1965, a search warrant was issued to search the Petitioner's premises. As a result of the evidence seized under the search warrant the Petitioner was indicted on the 18th day of June, 1966. (Tr. 21) Judgment was entered against the Petitioner on December 7, 1966 (Appendix "B", p. 34) (Tr. 34); Petitioner's motion for new trial was overruled January 20, 1967 (Tr. 33); and the Petitioner was sentenced on March 3, 1967 (Appendix "B", p. 36) (Tr. 35). Petitioner was required to raise his points of error before August 3, 1967. (Art. 40.09, Sections 3, 6, 9, C.C.P. of Texas). All of these events took place before the Supreme Court of the United States decided *Marchetti v. United States,* supra, and *Grosso v. United States,* supra. The Petitioner did not urge that the law set down in *Marchetti v. United States,* supra, and *Grosso v. United States,* supra, was applicable until the case was before the Court of Criminal Appeals. The Court of Criminal Appeals in its opinion stated:

> "Without discussing the question of retroactivity of those holdings [referring to Marchetti and Grosso, supra], we do observe that in both cases the accused refused to buy the Wagering Occupational . . . . Here

> appellant did not rely upon his 5th Amendment right and purchased the Wagering Stamp, and thus waived any right he might have had not to incriminate himself. This ground of error is overruled."

One of the corroborating facts relied upon to establish probable cause in the affidavit for search warrant was as follows:

> "The affiants have knowledge and know that the said Sherman T. Irwin has purchased federal wagering occupation stamps from the Austin District to cover a period from July 1, 1964 through June 30, 1965." (Appendix "E", p. 41).

## II.

**Statement of the case relating to "Good Cause".**

The affidavit for search warrant and the search warrant are attached hereto as Appendix "E" (pp. 40 to 46). A careful reading of the aforesaid affidavit reflects the following:

(a) that the information given by the alleged two credible persons was not only hearsay to the affiants but was also hearsay to the informers;

(b) that the facts the affiants relied upon for establishing a substantial basis for crediting the hearsay or to corroborate the hearsay information given by the informers was hearsay to the affiants;

(c) that the facts stated "to establish a substantial basis for crediting the hearsay" were not given to the affiants by fellow officers;

(d) that the affiant fails to state that the person or persons who observed corroborating facts, if they did,

used to establish a substantial basis for crediting the hearsay was obtained from credible persons;

(e) that the entire affidavit appears to be hearsay, or hearsay on hearsay.

Even though the Petitioner objected strenuously to the introduction of the evidence seized (S.F. 79-87), the trial court permitted the evidence which was classified as policy paraphernalia to be introduced into evidence (S.F. 147, 156, 161, 163, 165, 170, 171, 181, 183, 186, 188).

The Court of Criminal Appeals of the State of Texas upheld the trial court's ruling. In its opinion the Court said:

> "He next contends that the affidavit is defective because it contains no statement that the affiants or their informers spoke with personal knowledge. The affidavit clearly contained recitations of facts known to the affiants. The omission of the word 'personal' preceding the word 'knowledge' does not vitiate the affidavits, as we view the holding of the Supreme Court of the United States in U. S. v. Ventresca, 380 U.S. 102, 13 L.Ed.2d 684, 85 S.Ct. 741. Viewing the affidavit as a whole we find it sufficient to show probable cause."

## III.

### Statement of the Case relating to "Bad Faith".

Texas Ranger J. L. Rundell and James Rogers presented an affidavit for search warrant, attached hereto as Appendix "E", to J. S. Holleman, Judge of the Second-Ninth Judicial Court of Texas, around 7:30 a.m. (S.F. 50) on the 7th day of February, 1965. (Tr. 10-12) In the affidavit, the officers swore that they believed policy para-

phernalia was located on the premises described in the affidavit at the time the affidavit was made. (Tr. 10-11) Sometime between 7:30 a.m. and 9:05 a.m., Judge J. S. Holleman issued the search warrant. (S.F. 50) (Tr. 15) However, the officers waited approximately eight hours to execute the search warrant. (S.F. 50) (Tr. 15) Officer Rundell testified that the reason the search warrant was not executed immediately was because he knew that the policy paraphernalia for the week's business was not there at the time the search warrant was obtained. (S.F. 50-53) Officer Rundell testified:

"Q. All right, sir, you were waiting for someone to arrive at the premises of Mr. Irwin?
"A. Yes, sir, we were.
"Q. And you expected that person to bring the paraphernalia, did you not?
"A. Yes, sir.
"Q. And that's why you were waiting?
"A. Yes, sir.
"Q. And that was the only reason you were waiting?
"A. Well that was the main reason we were waiting.
"Q. In other words, you thought some policy paraphernalia would arrive that afternoon?
"A. Well, we thought some policy paraphernalia would arrive that afternoon.
"Q. You thought that the policy paraphernalia would arrive that afternoon?
"A. I thought some would arrive.
"Q. But if you thought the policy paraphernalia was there, Mr. Rundell, you would have executed the search warrant immediately, would you not?
"A. We knew that the policy paraphernalia for the week's business immediately preceding Sunday *would not arrive* until that afternoon. (Emphasis added)

* * *

"Q. You didn't think that week's policy paraphernalia was in Polk County when you went to Judge Holleman in the morning to get the search warrant?
"A. No, sir. I did not think the policy paraphernalia for the week immediately preceding the week of February 7th would be there until that afternoon.
"Q. Did you tell Judge Holleman that?
"A. I don't recall whether I did or whether I didn't."

At 2:30 p.m. Russell Bond arrived at Petitioner's premises and later left. (S.F. 231) After Russell Bond left the premises the search was conducted. Petitioner alleged that because the officer did not believe what he swore to the affidavit, the affidavit was made in bad faith and therefore violated his rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States. The Court of Criminal Appeals of the State of Texas stated in its opinion:

> "The good faith of the officer's affidavit could not be questioned since during the search of the premises in addition to the paraphernalia brought there that afternoon they found an 'implement, device or equipment' in the form of a policy cage which could not have been brought in a suitcase which arrived later in the day."

However, there is nothing in the entire Statement of Facts that indicates when the cage was brought to the premises, nor does the affiant state in his affidavit that he thought the "cage" was on the premises at the time he obtained the search warrant, even though a "cage" would be policy paraphernalia.

## REASONS FOR GRANTING THE WRIT

### I.

**The affidavit for search warrant included a privileged statement under the Fifth Amendment to the Constitution of the United States to establish probable cause for issuance of a search warrant.**

This Court should grant writ of certiorari to establish a standard by which a reviewing court should approach the effect of the ruling in *Marchetti v. United States,* supra, and *Grosso v. United States,* in cases where the state government makes use of evidence in a prosecution that a person complied with the Federal Wagering Tax Statutes, prior to January, 1968.

In the present case the State of Texas relied upon the Petitioner's purchase of a Federal Wagering Stamp prior to January of 1968 to establish probable cause for the issuance of a search warrant.

The question becomes whether or not the said information could be used against the Petitioner due to the fact that it is clear that the privilege against self-incrimination would be a complete defense if the Petitioner had not purchased the wagering stamps. The State of Texas has comprehensive statutory prohibitions against gaming, gambling, wagering, and associated activities. See Texas Penal Code Anno., Art. 642(c). Mr. Irwin could not comply with the provisions of the federal wagering tax scheme without incriminating himself under Texas law.

In determining waiver of the privilege against self-incrimination no distinction can be made between a person who violates the Federal Wagering Tax Statutes and

thereafter pleads guilty in open court and a person who complies with the Federal Wagering Tax Statutes. See *United States v. Lookretis,* 398 F.2d 64 (1968). The only questions that remain are whether Petitioner, Sherman T. Irwin, waived the constitutional defense guaranteed him by the Fifth Amendment to the Constitution of the United States by complying with the Federal Wagering Tax Statutes and whether the Petitioner has a right to complain that his constitutional rights have been violated when evidence that he purchased a wagering stamp was used against him in another proceeding to establish probable cause in an affidavit for search warrant where the conviction was obtained prior to January 29, 1968, but appeal was still pending after January 29, 1968.

The Court of Criminal Appeals of the State of Texas held that the Petitioner waived any right he might have not to incriminate himself. See Opinion, Appendix "A".

The Court of Criminal Appeals of the State of Texas erred in holding that Petitioner's compliance with the Federal Wagering Tax Statutes waived the defense against use of the information in a state proceeding guaranteed by the Fifth Amendment. In *Butler v. United States,* 361 F.2d 220 (5 Cir. 1966), Butler had pled guilty to violations of the wagering tax provisions. He appealed to the Fifth Circuit alleging his plea of guilty was involuntary; however, he made no contention the compliance with the wagering tax provision violated the privilege against self-incrimination. On application for certiorari, the Supreme Court vacated and remanded for further consideration in light of *Marchetti v. United States,* 390 U.S. 39, 88 S.Ct. 697 (1968) and *Grosso v. United States,* 390 U.S. 62, 88 S.Ct. 709 (1968). The Fifth Circuit entered an order vacating the conviction of Butler

and remanded the cause to the district court for dismissal of the indictment. [It appears that the government has opposed the instruction to dismiss.]

Petitioner takes the position that the *Butler* case is controlling on the issue whether Sherman Irwin's compliance with the Federal Wagering Tax Statutes waived the constitutional defense guaranteed to him by the Fifth Amendment.

Even if *Butler* is not controlling, Sherman Irwin did not waive his right to the constitutional defense guaranteed to him by the Fifth Amendment. Waiver will be found to exist only when there has been an "intentional relinquishment or abandonment of a known right or privilege." See *Johnson v. Zerbst,* 304 U.S. 458, at 464 (1938). *Barber v. Page,* 390 U.S. 719, 725 (1968).

Under the constitutional standards, a waiver, to be effective, must be volitional and there must be knowledge of the right or privilege allegedly waived. It is simply impossible for a person to waive a privilege or right of which he neither actually or constructively possesses knowledge. *Miranda v. Arizona,* 384 U.S. 436 (1966), 86 S.Ct. 1602.

At the time Irwin allegedly purchased the wagering stamp and further at the time he was tried under the present indictment, the authoritative cases of *United States v. Kahriger,* 345 U.S. 22, 73 S.Ct. 510, and *Lewis v. United States,* 348 U.S. 419, 75 S.Ct. 415, squarely held that the privilege against self-incrimination furnished no protection to persons charged with wagering tax violations which would include the purchase of a wagering stamp. Those decisions were not overruled, and the defense recognized for the first time until January 29,

1968, when the *Marchetti* and *Grosso* cases were decided. The *Grosso* case itself squarely holds that the failure to assert the Fifth Amendment defense while *Kahriger* and *Lewis* remained the law did not waive the defense. See also *United States v. Manfredonia,* 391 F.2d 229 (2 Cir. 1968); *Harris v. United States,* 390 F.2d 616 (8 Cir. 1968).

In *United States v. Lookretis,* 398 F.2d 64 (1968), a Seventh Circuit decision, a similar resolution of the waiver question was reached. In the *Lookretis* case, defendant was tried by the court and convicted of certain violations of the federal wagering tax statute. In the course of the trial, a stipulation was introduced into evidence which set forth the fact that the *defendant had voluntarily complied with certain provisions of the wagering tax statutes. Although no objection was raised to the use of this evidence in the trial court, the defendant, on appeal, asserted that its use violated his privilege against self-incrimination.* (Emphasis added) The Court of Appeals affirmed the conviction, holding that the evidence complained of was merely cumulative of other competent evidence and no prejudice from its admission had been shown. *United States v. Lookretis,* 385 F.2d 487 (1967). However, certiorari was granted and the judgment vacated in a *per curiam* opinion. See ____ U.S. ___ , 88 S.Ct. 1097 (No. 913, October Term, 1967). This *per curiam* opinion relied on *Marchetti,* supra, and *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824. Upon remand, the Seventh Circuit reversed its earlier ruling and held for the defendant. In doing so, the court concluded that in light of the then-controlling law as set forth in *Lewis* and *Kahriger,* neither the defendant's voluntary compliance with certain provisions of the tax law nor his failure

to object at the trial to the admission of evidence of such voluntary compliance constituted waiver.

The preceding case appears to be on all fours with the present situation. The Petitioner voluntarily complied with certain provisions of the Federal Wagering tax laws; the evidence was later used against him; and the Petitioner at the time of trial did not contend that such statement violated the privilege against self-incrimination. On appeal, Petitioner asserted that its use violated his privilege against self-incrimination. In light of *United States v. Lookretis, Marchetti* and *Grosso,* supra, Petitioner's actions did not constitute a waiver.

The affiant's statement in the affidavit for search warrant is tainted with unconstitutionality because it contains a statement illegally obtained in violation of the Petitioner's constitutional rights against self-incrimination. The State having used illegally obtained evidence in the affidavit for search warrant, the search warrant should not have been issued. This doctrine is commonly known as "fruit of the poisonous tree" doctrine. See *Silver Thorn Lumber Company, Inc. v. United States,* 40 S.Ct. 182, 251 U.S. 385 (1920). See also *Nardone v. United States,* 308 U.S. 338, 60 S.Ct. 266 (1939); *Smith & Anderson v. United States,* 344 F.2d 545 (D.C. Cir. 1965).

In the event that the State of Texas contends no prejudice from its use had been shown, the State of Texas must concede that the "harmless-constitutional error rule" promulgated in *Chapman v. State of California,* supra, to the effect that:

> ". . . there may be some constitutional errors which in the setting of a particular case are so unimportant

> and insignificant that they may, consistent with the Federal Constitution be deemed harmless, not requiring the automatic reversal of the conviction."

is subject to a limitation that once a constitutional infraction has been shown, the government must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained". *Chapman v. California,* supra, p. 24, 87 S.Ct. 828.

It cannot be presumed that the trial judge exercised his ability to discriminately treat the improperly used evidence without drawing any prejudicial inferences. The Court of Appeals, Seventh Circuit, stated in *United States v. Lookretis,* "Such presumption overlooks the fact that the trial judge would have no reason, in this pre-Marchetti trial, to regard the recitals of the stipulation concerning the application for and issuance of the Federal Wagering tax stamp as being inadmissible against the defendant on a Fifth Amendment challenge, which although not made was, nevertheless, in the posture of this case, not waived. Under the circumstances of this case we have no basis for concluding that the error was harmless. . . . The trial judge had no reason to reject what the teaching of Marchetti has since established to be inadmissible on a proper assertion of the privilege against self-incrimination."

## II.

### The affidavit for search warrant fails to establish probable cause for issuance of a search warrant.

This Court should grant writ of certiorari to establish a standard by which a reviewing court should approach the interpretation of affidavits supporting warrants which

have been issued by an examining magistrate and should further hold that "if hearsay evidence is to be relied upon in the preparation of an affidavit for a search warrant, the officer preparing such an affidavit should keep in mind hearsay statements are only as credible as their source and only as strong as their corroboration." And where the source of the information is hearsay to the informer and the corroborating facts stated by the affiants are hearsay to the affiants, fellow investigators, or persons known to be credible to the affiants, the affidavit is insufficient to establish probable cause, as required under the Fourth and Fourteenth Amendments to the Constitution of the United States.

In Petitioner's motion to suppress evidence, and in his objections to the introduction of evidence seized under color of a search warrant during the trial, Petitioner duly set up and claimed denial of his rights guaranteed to him under the Fourth and Fourteenth Amendments of the Constitution of the United States. The refusal of the trial court to suppress evidence was contrary to the express rulings by this Court in *Aguilar v. State of Texas,* 378 U.S. 108, 84 S.Ct. 1509; *Giordenello v. United States,* 357 U.S. 480, 78 S.Ct. 1247; and *United States v. Ventresca,* 380 U.S. 102, 85 S.Ct. 741.

As previously stated, in the Statement of the Case, the affidavit for search warrant not only contained no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein, it does not even contain an affirmative allegation that the affiant's unidentified source spoke with personal knowledge, nor does the affidavit state that the affiant, fellow officer, or credible person, had any personal knowledge of any facts to create a substantial basis for crediting the hearsay.

In *Aguilar v. State of Texas,* supra, wherein this court held the affidavit failed to establish probable cause, the Supreme Court stated, referring to the affidavit, at p. 1513:

> "The affidavit here not only contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein, it does not even contain an affirmative allegation that the affiant's unidentified source spoke with personal knowledge. For all that appears, the source here merely suspected, believed, or concluded that there were narcotics in petitioner's possession."

In the present case, there is no allegation in the affidavit that the affiant spoke with personal knowledge of the matters contained therein and, furthermore, it does not contain an affirmative allegation that the affiant's unidentified source spoke with personal knowledge, just as in *Aguilar v. Texas,* supra.

In *United States v. Ventresca,* supra, p. 746, this Court states:

> "The Court of Appeals conceded that the affidavit stated that the investigators themselves smelled the odor of fermenting mash, but argued that the rest of their information might itself have been based upon hearsay thus raising the *'distinct possibility of hearsay upon hearsay'*—324 F.2d at 869. For this reason, it held that the affidavit did not establish probable cause." (Emphasis added)

The Supreme Court of the United States then states on p. 747:

> "We disagree with the conclusion of the Court of Appeals. Its determination that the *affidavit might*

> *have been based wholly upon hearsay* cannot be supported in light of the fact that Mazaka, a government investigator, swore under oath that the relevant information was in part based *'upon observations made by me' and 'upon personal knowledge' as well as upon 'information which has been obtained from the investigators of the Alcohol and Tobacco Tax Division, Internal Revenue Service, who have been assigned to this investigation."* (Emphasis added)

The Supreme Court of the United States reversed the lower court decision holding that the affidavit failed to establish probable cause, however, the Supreme Court appears to have affirmed the legal propositions (a) that an affidavit based on hearsay will be sufficient "so long as a substantial basis for crediting the hearsay is present;" (b) that the substantial basis necessary for crediting the hearsay must be corroborating facts of which the affiant has personal knowledge or in the alternative facts of which fellow officers engaged in a common investigation have personal knowledge. In other words, if hearsay is relied upon to establish probable cause, the substantial basis for crediting the hearsay cannot be entirely hearsay statements as to the affiant or fellow investigators. If the affidavit does not set forth a single corroborating fact that is within the personal knowledge of the affiant or fellow investigator or there is not a single statement in the affidavit that could not well be hearsay on hearsay or some other multiple form of hearsay, probable cause has not been established.

In the present case before the Court, the affidavit for search warrant makes no statement of personal observation by the affiant, makes no statement of any personal knowledge on the part of the affiant, and makes no statement that any of the information came from the observa-

tions or personal knowledge of fellow officers, or from personal knowledge or personal observations of other credible persons.

The statements made by the affiants could well be hearsay on hearsay, or some other multiple form of hearsay to the affiants or fellow investigators. Yet the Court of Criminal Appeals of the State of Texas held that the affidavit was sufficient to establish probable cause contrary to the standards set down by the Supreme Court of the United States. *Aguilar v. State of Texas,* supra; *United States v. Ventresca,* supra.

## III.

### The affidavit for search warrant was not made in good faith.

In *Rugendorf v. United States,* 376 U.S. 528, 84 S.Ct. 825, the appellant attacked the sufficiency of the search warrant and attacked the sufficiency of the affidavit for probable cause in issuing a search warrant because there were some discrepancies in the proof offered and the statements in the affidavit for search warrant. The discrepancies in the petition were actually only a peripheral relevancy in showing probable cause and did not go to the integrity of the affidavit. However, the Supreme Court indicates that if the discrepancies had been material, the search should have been suppressed because the search violated the Fourth Amendment to the Constitution of the United States.

In the present case, the affiants stated in the affidavit that the policy paraphernalia was on the Petitioner's premises prior to 9:05 a.m. on February 7, 1965. The affiants waited approximately eight hours to execute the

search warrant because they did not believe policy paraphernalia introduced into evidence would arrive until that afternoon. Petitioner contends that the discrepancy is major, is material, and constitutes an affidavit made in bad faith. The search should have been suppressed in violation of the Petitioner's rights under the Fourth and Fourteenth Amendments to the Constitution of the United States.

In *Fraternal Order of Eagles No. 778 v. United States,* 57 F.2d 93, the Court stated on p. 94 as follows:

> "The government may not make an entry by means of *false representation,* search as fully as possible without arousing suspicion, and later make the fruits of that entry and search the basis of what otherwise might be a legal search and seizure. . . . A search and seizure following an entry into a house . . . of a person suspected of a crime by means *of fraud,* are unreasonable and violate the Fourth Amendment."

See also *King v. United States,* 282 F.2d 398 (affiant gave false information in affidavit for search warrant); *United States v. Pierce,* 275 F.2d 318 (affiant stated he had received confidential information from a source which had in the past proved reliable which turned out to be false). These cases were reversed because it violated the petitioner's rights under the Fourth Amendment to the Constitution of the United States.

## CONCLUSION AND PRAYER

From the facts and authorities presented, the reasons for granting the writ of certiorari may be summarized as follows: The Texas Court of Criminal Appeals, in refusing to suppress the evidence, has violated the Petitioner's rights for the following reasons:

(a) the State of Texas attempted to establish probable cause by the use of evidence obtained in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States;

(b) the affidavit for search warrant failed to establish probable cause as required under the Fourth and Fourteenth Amendments to the Constitution of the United States;

(c) the State of Texas attempted to establish probable cause by making statements in the affidavit for search warrant that they did not believe to be true, in violation of the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

WHEREFORE, Petitioner respectfully prays that this Honorable Supreme Court of the United States grant writ of certiorari to correct the errors of the Honorable Court of Criminal Appeals of the State of Texas and of the trial court whose actions it affirms.

Respectfully submitted,

J. EDWIN SMITH
JACK J. RAWITSCHER
CLAYTON MALONE
*Attorneys for Petitioner*

## APPENDIX "A"

NO. 41,234

SHERMAN T. IRWIN, Appellant

vs.

THE STATE OF TEXAS, Appellee

Appeal From POLK County

### OPINION

The conviction is for keeping a policy game; the punishment, two years.

Ground of error No. 4 is that the trial court reversibly erred in failing to suppress evidence obtained under the alleged search warrant which the appellant contends was illegally issued and is invalid.

The affidavit for the search warrant and the warrant exhibited to the judge are not shown in the transcript of the evidence, and do not appear among the exhibits in the case. Appellant attached to his motion to suppress evidence a purported copy of an affidavit and warrant. Such instruments cannot be considered in reviewing the ground of error presented. Doby v. State, 383 S.W.2d 418. For the reason pointed out, ground of error No. 4 does not reflect error.

In ground of error No. 1 the appellant contends that the trial court reversibly erred in failing to charge the jury upon the law of extraneous offenses in that, it did not instruct the jury not to consider such extraneous offenses unless they believed they had been proven beyond a reasonable doubt.

Omitting the formal parts, the indictment alleges that the appellant: "On or about the 7th day of February, A.D. 1965, * * * did then and there unlawfully keep and exhibit for the purpose of gaming, a policy game."

The testimony of the state reveals that Texas Rangers Rundell and Rogers together with other officers found the appellant at home when they went to his residence which was located in a rural area in Polk County, on Sunday, February 7, 1965, shortly after Russell Bond, bookkeeper for T and L Policy Company, had arrived; that said company was owned and operated by the appellant; that in appellant's house the officers found a tan suit case (state's exhibit No. 2), bundles of tear out sheets containing plays for several previous days, over $13,000 in money, hit slips, "squirrel cage," and other items of policy paraphernalia; that a large number of the hit slips had been used on at least eight different days before February 7, 1965; and also other slips which could be used in the future. The evidence further shows that these articles were adaptable to and could be or had been used in the operation of a policy game.

Texas Ranger Rundell testified on direct examination, in part, as follows:

"Q. (State's Attorney, continuing): I will ask you this: When was the last time that you had an occasion to have a conversation with the Defendant, Sherman Irwin?
"A. Well—
"Q. I will ask you whether or not during the year of 1966 in or about the month of February or March you had occasion to talk to the Defendant, Sherman T. Irwin?
"A. I did.
"Q. Where was that?

"A. One time it was at the Ben Milam Hotel in Houston, Texas, and the other time was on the parking lot of the Hovas Furniture Company, there in Houston, Texas.

"Q. What was the nature of the conversation as relating to whether or not Mr. Irwin was engaged in any sort of a business at that time?

"Appellant's Attorney: We object to that, your Honor, on the basis that first of all, it is too remote. Second, he was not advised of his rights and any statement he would have made under those circumstances would be inadmissible.

"The Court: Overruled.

"Appellant's Attorney: Note our exception.

"A. (The Witness, continuing): He stated to myself and my partner that he had been operating a policy game for over thirty years.

"Q. Would that be over the past thirty years?

"A. Yes, sir.

"Q. Did he tell you under what name he operated?

"A. He stated he first opened up under the name, I believe, of the G. and W. and then later on it was closed down and he opened up under the T. and L., which he had been operating since.

"Q. That conversation took place in February or March of 1966?

"A. Yes, sir; it did.

"Q. All right, and that occurred there in the City of Houston?

"A. Yes, sir.

"Q. At such time he was not under arrest?

"A. No, sir; he was not.

"Q. All right; had you met him at his request or at your request?

"A. At his request.

"Q. And the statements he made to you there were voluntarily made by him?

"A. Yes, sir.

"Q. During the course of your conversation?

"A. Yes, sir."

The state called four witnesses: Herman Munson, the lessor of the premises where the appellant resided; Texas Rangers Rundell and Driskell; and Melvin Hill, an employee of the appellant.

The appellant did not testify or offer any testimony in his behalf.

Melvin Hill testified that he was employed by the appellant from June 18, 1963, to June, 1966, and was working for him in January and February, 1965; that the appellant during this time owned and operated a policy game under the name of T and L Company, and that he worked for him as a manager or field man; that he had ten or eleven writers working under him taking bets on numbers; that he collected the money from the writers who had accepted bets on T and L policy game and delivered it to R. I. Bond, who began working as a bookkeeper for the appellant in June, 1964, in the operation of T and L Company, and Bond gave him the money to give the writers to pay the winners; that sometime about January, 1965, he accompanied Bond in his camper truck to appellant's residence; that on Sunday, January 31, 1965, Bond went with him in his (Hill's) car from Dickinson, Texas, to the appellant's residence in Polk County, Texas, and that they took a brown suit case (state's exhibit No. 2) with them which was very heavy; that there were writers, players and pickup men in Galveston County, and that he had $750 in money for the purpose of operating a policy game when he was arrested February 8, 1965 in Galveston County.

The series of segregated acts and the material in evidence, taken together, are by their nature a connected course of operation which go to make up and comprise the keeping of a policy game, and when they are considered along with the statements of the appellant in

February or March, 1966, that he had been operating a policy game for over the past thirty years, it is concluded that the evidence is sufficient to support the conviction of keeping for the purpose of gaming, a policy game, in Polk County, Texas. Griffey v. State, 342 S.W.2d 582. And further, that such acts and material are not extra, beyond, or foreign to the offense of keeping a policy game, and that it was not necessary to apply the burden of proof to each of the acts which could be considered on the trial for such offense. Ground of error No. 1 is overruled.

Ground of error No. 2 is that the trial court reversibly erred in admitting testimony that the appellant had the largest policy game in operation.

The testimony of Ranger Driskell reflects that he was experienced in the organization, handling and operation of policy games, and that there were different size games; that since June 18, 1963, he had been familiar with the operation of the T and L policy game (appellant's), and also, the operation of other policy games during that time and that in his opinion the T and L policy game was the largest policy game in operation.

In light of the above testimony, the nature and extent of the other evidence, and the statements of the appellant that he had been operating a policy game over the past thirty years, it is concluded that no reversible error is shown.

Error is urged on the ground that the trial court failed to charge upon the law of principals.

The summary of the evidence herein is sufficient to show that the refusal to so charge was not error.

The judgment is affirmed.

Belcher, Judge

(Delivered May 15, 1968)

No. 41,234

SHERMAN T. IRWIN, Appellant

vs.

THE STATE OF TEXAS, Appellee

APPEAL FROM POLK COUNTY

AFFIRMED

OPINION BY
BELCHER, Judge.

FILED IN
COURT OF CRIMINAL APPEALS
MAY 15, 1968
Glenn Haynes, Clerk

No. 41,234

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SHERMAN T. IRWIN, Appellant

v.

THE STATE OF TEXAS, Appellee

---

APPEAL FROM POLK COUNTY

---

## OPINION ON APPELLANT'S MOTION FOR REHEARING

By Supplemental Transcript the trial court has forwarded to this Court the affidavit for the search warrant and we will now discuss the grounds of error relating thereto not considered in our original opinion.

Appellant's first ground of error in regard to the affidavit is that it was made in bad faith. He predicates this contention on the ground that the affidavit alleges that the place sought to be searched was "a place where implements, devices, equipment and paraphernalia" used in a "policy game" are kept, whereas Officer Rundell testified that he expected someone to bring policy paraphernalia to appellant's address on the afternoon he executed the warrant. The good faith of the officers' affidavit could not be questioned since during the search of the premises in addition to the paraphernalia brought there that afternoon they found an "implement, device or equipment" in the form of a policy cage which could not have been brought in the suit case which arrived later in the day.

Appellant next contends that the affidavit for the search warrant violated his constitutional rights under the Fifth Amendment of the United States Constitution because it contained, among other allegations of probable cause, this sentence: "The affiants have knowledge and know that Sherman T. Irwin has purchased Federal Wagering Occupation Stamps from the Austin District to cover a period from July 1, 1964 through June 30, 1965." His contention relies upon the two recent opinions of the Supreme Court of the United States in Marchetti v. U. S., ____U.S. ____; 19 L.Ed.2d 889; 88 S.Ct. 697, and Grosso v. U. S., ____U.S.____; 19 L.Ed.2d 906; 88 S.Ct. 709.

Without discussing the question of the retroactivity of those holdings, we do observe that in both cases the accuseds refused to buy the Wagering Occupation stamps and the Supreme Court upheld their refusal on the ground that to require them to make known to the public the fact that they were preparing to violate State law would be an abridgment of their Fifth Amendment right not to incriminate themselves. Here appellant did not rely upon his Fifth Amendment right and purchased the Wagering stamp, and thus waived any right he might have had not to incriminate himself. This ground of error is overruled.

He next contends that the affidavit is defective because it contains no statement that the affiants or their informers spoke with their own personal knowledge. The affidavit clearly contained recitations of facts known to the affiants.[1]

---

1. "We have recently received, within the last thirty days, information from two credible persons who have furnished us reliable information on several occasions within the past five years. The information which we have received is that Sherman T. Irwin said that he had on the above described premises a duplicating machine and equipment on which he was currently producing and printing policy slips for the use and purpose of gaming and carrying on a

The omission of the word "personal" preceding the word "knowledge" does not vitiate the affidavit, as we view the holding of the Supreme Court of the United States in U. S. v. Ventresca, 380 U.S. 102, 13 L.Ed.2d 684, 85 S.Ct. 741. Viewing the affidavit as a whole we find it sufficient to show probable cause.

His next ground of error is that the court erred in not requiring the State to disclose the names of the affiants' informers. Appellant points to no fact which would intimate that the informers had taken a material part in the commission of the offense, or had been present when the offense was committed, or might have been a witness to its commission. We adhere to our recent holding in Acosta v. State, 403 S.W.2d 434, in which we discussed the holdings of the Supreme Court of the United States in Roviaro v. United States, 353 U.S. 53, 1 L.Ed.2d 639, 77 S.Ct. 623, and Rugendorf v. United States, 376 U.S. 528, 11 L.Ed.2d 887, 84 S.Ct. 825.

Though not discussed in our original opinion we will now overrule appellant's ground of error that the trial

---

policy game; and that there was on these premises other necessary books, implements, equipment and paraphernalia for the carrying on of a policy game.

"We were further informed by the same sources that the said Sherman T. Irwin had in his employment more than a dozen persons engaged in the carrying on of policy games.

* * * *

"We the affiants, also have knowledge that the said Sherman T. Irwin has been engaged from time to time for the past twenty years, in the illegal occupation of keeping and exhibiting a policy game.

"An intermittent surveillance of the above described premises carried on for a period of the last three or four weeks, has revealed Melvin Hill, also known as Percy Hill, and Russell I. Bond, both residents of Galveston County, Texas, and both known to the affiants to be involved in carrying on and keeping and exhibiting of policy games, coming upon and leaving the above described premises."

court erred in failing to disqualify himself at the trial because he acted as the magistrate who issued the search warrant. We do not agree that this case comes within the rule announced by the Supreme Court of the United States in In re Murchison, 349 U.S. 133, 99 L.Ed. 942, 75 S.Ct. 623. In that case what the court heard while acting as a "one man grand jury" went to the guilt or innocence of the accused. In the case at bar the recitations in the affidavits were reduced to writing and became a public record. These recitations were the only thing the trial court or this Court could consider. They are before us now for review and we hold them to be sufficient.

In addition to what we said in our original opinion we now point out that in appellant's objections to the court's charge he does not give the court any intimation or notice as to which testimony he now refers to as "extraneous offenses". In Garver v. State, 258 S.W.2d 812, we said "If an accused is dissatisfied with the court's charge, he should make his objections in specific terms, thereby clearly informing the court of what he wants or does not want in the charge."

Appellant's motion for rehearing is overruled.

MORRISON, *Judge*

(Delivered July 10, 1968)

No. 41,234

SHERMAN T. IRWIN, Appellant

vs.

THE STATE OF TEXAS, Appellee

APPEAL FROM POLK COUNTY

APPELLANT'S MOTION FOR REHEARING OVERRULED

OPINION BY
MORRISON, Judge.

FILED IN
COURT OF CRIMINAL APPEALS
JUL 10, 1968
Glenn Haynes, Clerk

## APPENDIX "B"

The STATE of TEXAS vs. SHERMAN T. IRWIN in District Court of Polk County, Second Ninth Judicial District of Texas.

No. 9267; November Term A.D. 1966; dated December 7, 1966.

This day this cause was called for trial, and the State appeared by her Criminal District Attorney, and the defendant, Sherman T. Irwin having been duly arraigned, appeared in person, in open court, his counsel also being present, and both parties announced ready for trial; and it appearing to the Court that the Defendant, his counsel, and the State's attorney have agreed in writing in open court to waive a jury in the trial of this cause and to submit this cause to the Court; and the Court having consented to the waiver of a jury herein, the indictment was read, and the Defendant entered his plea of not guilty thereto.

And the Court having heard all the evidence submitted for the State and the Defendant and argument of counsel is of the opinion and so finds that the said Defendant is guilty of the offense of KEEPING A POLICY GAME FOR THE PURPOSE OF GAMING, as charged in the indictment.

Thereupon a jury of good and lawful persons, to-wit: Harold Poorman and eleven others, was duly selected, impaneled and sworn, according to law, to assess said Defendant's punishment in said cause, and the evidence submitted for the State and for the Defendant was duly heard, and at the conclusion of such evidence, the Court charged the jury with written instructions as to the law

applicable to the punishment in said cause; thereupon the argument of counsel for the State and the Defendant was duly heard and concluded, and the jury retired in charge of the proper officer to consider of their verdict as to Defendant's punishment; and afterward was brought into open court by the proper officer, the Defendant and his counsel being present, and in due form of law returned into open court the following verdict, which was received by the Court and is here now entered upon the minutes of the Court, to-wit:

We, the jury, assess the punishment of the Defendant at confinement in the Texas Department of Corrections of Walker County, Texas, for a term of Two (2) Years.

/s/ Harold Poorman, *Foreman*

IT IS THEREFORE CONSIDERED and ADJUDGED by the Court that the Defendant, SHERMAN T. IRWIN, is guilty of the offense of KEEPING A POLICY GAME FOR THE PURPOSE OF GAMING, as charged in the indictment, as found by the Court, and that he be punished as found by the jury, that is by confinement in the Texas Department of Corrections of Walker County, Texas, for a term of Two (2) Years.

J. S. HOLLEMAN, *Judge*
2nd Ninth Judicial District of
Texas

The STATE of TEXAS vs. SHERMAN T. IRWIN

No. 9267

In the District Court of Polk County
Second Ninth Judicial District of Texas

Date: March 3, 1967

(November Term, 1966)

This day this cause being again called, the State appeared by her District Attorney, and the defendant SHERMAN T. IRWIN was brought into open Court in person, in charge of the Sheriff, for the purpose of having the sentence of the law pronounced in accordance with the verdict and judgment herein rendered. And thereupon the said defendant was asked by the Court whether he had anything to say why said sentence should not be pronounced against him and he answered nothing in bar thereof. Whereupon the Court proceeded in the presence of the said defendant to pronounce sentence against him as follows:

IT IS ORDERED by the Court that the defendant SHERMAN T. IRWIN, who has been adjudged to be guilty of the offense of KEEPING A POLICY GAME FOR THE PURPOSE OF GAMING, as charged in the indictment, be, and is hereby, sentenced to confinement in the State Penitentiary for a term of not less than two (2) nor more than two (2) years and that he be delivered by the Sheriff of Polk County, Texas, or the authorized agent of the State of Texas, to the Director of Corrections of said State Penitentiary, or other person legally authorized to receive such convicts, and the said Defendant shall

be confined in the manner and for the period aforesaid. And the said Defendant is hereby remanded to jail until the directions of this sentence can be obeyed.

J. S. HOLLEMAN, *Judge*
Second Ninth Judicial District,
Polk County, Texas

THE STATE OF TEXAS, COUNTY OF POLK:

I, Howard Jones, Clerk of the District Court in and for the County of Polk, State of Texas, hereby certify that the above is a true and correct copy of the sentence in the above entitled cause, as appears of record in the Criminal Minutes of said Court in Vol. M, Page 477.

WITNESS MY HAND and seal of office at Livingston this 3rd day of March, 1967.

HOWARD JONES, *Clerk*
District Court
Polk County, Texas

## APPENDIX "C"

CLERK'S OFFICE, COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

I, GLENN HAYNES, Clerk of the Court of Criminal Appeals of Texas do hereby certify that in Cause No. 41,234 styled:

SHERMAN T. IRWIN,

Appellant

vs.

THE STATE OF TEXAS,

Appellee

the judgment of the Second-Ninth Judicial District Court of Polk County, Texas, was affirmed by this Court on May 15, 1968; Appellant's Motion For Rehearing was overruled on July 10, 1968; and Appellant's Second Motion For Rehearing was overruled without written opinion on October 16, 1968.

THEREFORE, with the overruling of Appellant's Second Motion For Rehearing this cause was disposed of by this Court on October 16, 1968. Appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas, said judgment has now become final on the docket of this Court.

WITNESS MY HAND and the Seal of said Court, at office, in Austin, Texas this 17th day of October, A. D. 1968.

GLENN HAYNES, Clerk, Court
of Criminal Appeals of Texas

## APPENDIX "D"

SHERMAN T. IRWIN, Appellant

NO. 41,234 ___APPEAL FROM POLK COUNTY

THE STATE OF TEXAS, Appellee

### ORDER STAYING ISSUANCE OF MANDATE

The application of Sherman T. Irwin for a stay of issuance of the mandate in this cause is granted, and the Clerk of the Court of Criminal Appeals is directed to stay the issuance of the mandate and all other proceedings upon the judgment against the appellant for a period of ninety (90) days from this date in order that he may apply to the Supreme Court of the United States for a writ of certiorari.

And the Clerk is further directed that in the event the writ is granted by the Supreme Court of the United States, the issuance of the mandate be delayed until final action by that Court upon the matter.

This the 17th day of October A. D., 1968.

W. C. MORRISON
Judge
Court of Criminal Appeals of
Texas

A TRUE COPY
ATTEST:

Filed in Court of Criminal Appeals Oct. 17, 1968
Glenn Haynes, Clerk

Clerk, Court of Criminal Appeals
of Texas

## APPENDIX "E"

THE STATE OF TEXAS §
§
COUNTY OF POLK §

### AFFIDAVIT FOR SEARCH WARRANT

Before me, the undersigned authority, on this day personally appeared the undersigned affiants who, being by me duly sworn upon oath, state that they have good reason to believe, and do believe that a certain place in Polk County, Texas, which can be located by going seven tenths of a mile on Farm to Market Road 2610, in a southerly direction from the Ace Community Post Office to the place where it is intersected by a dirt and iron ore road, and then by following the dirt and iron ore road in a westerly direction four tenths of a mile to the premises described as a fenced enclosure, containing several one-story buildings which are separate structures and are not joined, but together are used as a residence. These buildings consist of a white frame building with asbestos siding, light-colored composition roof, and blue trim, and having on the west side a blue corrugated, plastic patio roof. This building is known as the kitchen. Also, a light green building, with white composition roof, plywood siding, Friedrich air conditioner installed in the south wall, and having a blue, corrugated plastic, partial fence around it, and three other medium green-colored buildings with plywood siding and composition roof, similar to the old Army G.I. type, one room, plywood huts, together with a hothouse and other out buildings, and motor vehicles located on the premises and within the curtilage, and being the premises under the control and in charge of Sherman T. Irwin, a white male person,

approximately 62 years of age, and six feet, one inch in height, and other person or persons whose identity and description are unknown to the affiants, is a place where implements, devises, equipment and paraphernalia are kept for the purpose of carrying on and aiding in the commission of offenses as described by Article 642c, of the Penal Code of the State of Texas, to-wit, the keeping and exhibiting for the purposes of gaming a policy game.

Our belief, as aforesaid, is based upon the following facts:

We have recently received, within the last thirty days, information from two credible persons who have furnished us reliable information on several occasions within the past five years. The information which we have received is that Sherman T. Irwin said that he had on the above described premises a duplicating machine and equipment on which he was currently producing and printing policy slips for the use and purpose of gaming and carrying on a policy game; and that there was on these premises other necessary books, implements, equipment and paraphernalia for the carrying on of a policy game.

We were further informed by the same sources that the said Sherman T. Irwin had in his employment more than a dozen persons engaged in the carrying on of policy games.

The affiants have knowledge and know that the said Sherman T. Irwin has purchased Federal Wagering Occupation stamps from the Austin District to cover a period from July 1st, 1964, through June 30, 1965.

We the affiants, also have knowledge that the said Sherman T. Irwin has been engaged from time to time,

for the past twenty years, in the illegal occupation of keeping and exhibiting a policy game.

An intermittent surveillance of the above described premises, carried on for a period of the last three or four weeks, has revealed Melvin Hill, also known as Percy Hill, and Russell I. Bond, both residents of Galveston County, Texas, and both known to the affiants to be involved in the carrying on and keeping and exhibiting of policy games, coming upon and leaving the above described premises.

WHEREFORE, we ask that a warrant to search for and seize the said property, implements and paraphernalia be forthwith issued in accordance with the law in such cases provided.

(Signed): James R. Rogers

(Signed): J. L. Rundell

SWORN TO AND SUBSCRIBED before me by J. L. Rundell and James F. Rogers on this the 7th day of February, A. D. 1965.

(Signed): J. S. Holleman, Judge,
2nd 9th Judicial District

THE STATE OF TEXAS § IN THE NAME AND
§ BY AUTHORITY OF
COUNTY OF POLK § THE STATE OF TEXAS

TO THE SHERIFF OR ANY PEACE OFFICER OF POLK COUNTY, TEXAS GREETING:

WHEREAS, a complaint, on oath, in writing and in accordance with law, has this day been made before me, alleging that the premises described as a certain place in Polk County, Texas, which can be located by going seven tenths of a mile on Farm to Market Road 2610, in a southerly direction from the Ace Community Post Office to the place where it is intersected by a dirt and iron ore road, and then by following the dirt and iron ore road in a westerly direction four tenths of a mile to the premises described as a fenced enclosure, containing several one-story buildings which are separate structures and are not joined, but together are used as a residence. These buildings consist of a white frame building with asbestos siding, light-colored composition roof, and blue trim, and having on the west side a blue corrugated, plastic patio roof. This building is known as the kitchen. Also, a light green building, with white composition roof, plywood siding, Friedrich air conditioner installed in the south wall, and having a blue, corrugated plastic, partial fence around it, and three other medium green-colored buildings with plywood siding and composition roof, similar to the old Army G.I. type, one room, plywood huts, together with a hothouse and other out buildings, and motor vehicles located on the premises and within the curtilage, and being the premises under the control and in charge of Sherman T. Irwin, a white male person, approximately 62 years of age, and six feet, one

inch in height, and other person or persons whose identity and description are unknown to the affiants, is a place where implements, devices, equipment, and paraphernalia are kept for the purpose of carrying on and aiding in the commission of offenses as described by Article 642c, of the Penal Code of the State of Texas, to-wit, the keeping and exhibiting for the purposes of gaming a policy game.

YOU ARE, THEREFORE, HEREBY COMMANDED to enter immediately and search the above described premises for implements, devices, equipment and paraphernalia, kept for the purpose of carrying on and aiding in the commission of the offenses as described by Article 642c, of the Penal Code of the State of Texas, to-wit, the keeping and exhibiting for the purposes of gaming a policy game, and to take possession of the same, and you are FURTHER COMMANDED to arrest the said Sherman T. Irwin, alleged to be the person in charge of said premises, and to arrest all other parties found in and on said premises, or making their escape therefrom.

HEREIN FAIL NOT, but have you then and there this warrant within three (3) days from its issuance, with your return thereon, showing how you have executed the same.

WITNESS my hand this the 7th day of February, A. D. 1965.

(Signed): J. S. Holleman, Judge
2nd 9th Judicial District

## OFFICERS RETURN

Came to hand the 7th day of February, A. D. 1965 at 9:05 o'clock A.M. and executed the 7th day of February, A. D. 1965 at 4:15 o'clock P.M. by
Taking the following listed policy paraphernalia and records and cash money:
records for month of January, 1965
records of tear out sheets for T & L policy game
records of new hit slips for T & L policy game
revolving number selector
cash money—$13,007.50
suitcase containing records & part of money.

(Signed): A. D. Holbrook

File No._____

THE STATE OF TEXAS
VS
SHERMAN T. IRWIN

SEARCH WARRANT

Issued the 7th day of Feb., A. D. 1965.
Filed May 24, 1965
(Signed) Howard Jones
Clerk District Court, Polk Co., Texas

SUPREME COURT, U. S.

FILED
MAR 26 1969
JOHN F. DAVIS, CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 902

SHERMAN T. IRWIN,
*Petitioner*

v.

THE STATE OF TEXAS,
*Respondent*

On Petition for Writ of Certiorari to
The Court of Criminal Appeals of Texas

## BRIEF FOR RESPONDENT IN OPPOSITION

CRAWFORD C. MARTIN
Attorney General of Texas
NOLA WHITE
First Assistant Attorney General
HAWTHORNE PHILLIPS
Executive Assistant
W. V. GEPPERT
Staff Legal Assistant
ROBERT C. FLOWERS
Assistant Attorney General
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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 902

SHERMAN T. IRWIN,

*Petitioner*

v.

THE STATE OF TEXAS,

*Respondent*

On Petition for Writ of Certiorari to
The Court of Criminal Appeals of Texas

## BRIEF FOR RESPONDENT IN OPPOSITION

## OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas has not yet been reported. A copy of the opinion is attached as an Appendix to the Petition for Writ of Certiorari at page 23 to page 32.

## JURISDICTION

The jurisdictional requisites would appear to be adequately set forth in the Petition, although Respondent disputes Petitioner's contention that any rights guaranteed by the United States Constitution have been denied.

## QUESTIONS PRESENTED

Petitioner presents two questions which he asserts should be reviewed by this Court. These questions may be restated and summarized as follows:

1. Does the affidavit, executed in support of the search warrant, on its face, show sufficient facts to establish probable cause for the issuance of the search warrant?

2. Is it constitutionally permissible to use the fact that Petitioner has purchased a Federal Wagering Occupational Stamp as an element of probable cause in a search warrant affidavit?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The due process clause of the Fourteenth Amendment, the Fourth Amendment and the Fifth Amendment of the Constitution of the United States are involved herein, as well as Vernon's Texas Penal Code, Article 642(c), Section 1. The Petition at page 4 and 5 sets out these pronouncements.

## STATEMENT OF THE CASE

Petitioner was convicted in the District Court of Polk County for unlawfully keeping for the purpose of gaming, a policy game; his punishment was assessed at two years in the penitentiary.

The testimony of the State reveals that Texas Rangers Rundell and Rogers together with other officers, armed with a search warrant, found the Petitioner at home when they went to his residence which was located in a rural area in Polk County, on Sunday, February 7, 1965, shortly after Russell Barnes, bookkeeper for T & L Policy Company had arrived. The T & L Policy Company was owned and operated by the Petitioner. In Petitioner's house the officers found a tan suitcase, bundles of tear-out sheets containing plays

for several previous days, over $13,000 in money, hit-slips, "squirrel cage," and other items of policy paraphernalia. A large number of the hit-slips had been used on at least eight different days before February 7, 1965. The evidence showed that these articles were adaptable to and could be or had been used in the operation of a policy game.

## ARGUMENT AND AUTHORITIES

### I.

### THE AFFIDAVIT SUPPORTING THE SEARCH WARRANT STATED SUFFICIENT FACTS TO SATISFY THE PROBABLE CAUSE REQUIREMENT OF THIS COURT.

The affidavit is set out in its entirety in the Petition at pages 40-42.

In *Aguillar v. Texas,* 378 U.S. 104, 84 S.Ct. 1509, a search warrant had issued upon an affidavit of a police officer who swore only that they had "received reliable information from a credible person and do believe" that narcotics were being illegally stored on the described premises. This Court held the affidavit inadequate for two reasons. First, the application failed to set forth any of the "underlying circumstances" necessary to enable the magistrate independently to judge the validity of the informant's conclusion that the narcotics were where he said they were. Second, the affiant officers did not attempt to support their claim that their informant was "credible" or his information "reliable." The facts set forth in this affidavit are sufficient to establish the "probable cause" re-

quired by the Texas statute and the due process requirements of the Fourth and Fourteenth Amendments of the United States Constitution.

Although the affidavit reflects that some of the information contained therein was based in part on hearsay information, such information may properly form the basis for a valid search warrant under the holding of *Jones v. United States,* 362 U.S. 257 (1960). Moreover, here a part of the information forming the foundation upon which the magistrate rested his decision—that there was probable cause to believe that implements, devices, equipment and paraphernalia were kept for the purpose of carrying on a gaming policy game on the premises described—was the direct, personal observation and knowledge of the affiant who had conducted an intermittent surveillance for a period of three or four weeks of the house concerned, and observed two persons known to the affiant to be involved in the carrying on and keeping and exhibiting of policy games, coming upon and leaving the above described premises.

The unnamed informants whose reliability was known, told the affiants that Petitioner had admitted that he had on the premises in question a duplicating machine and equipment on which he was currently producing and printing policy slips for the use and purpose of gaming and carrying on a policy game.

The unnamed informants told the affiants that Petitioner had in his employment more than a dozen persons engaged in the carrying on of policy games. While the facts and circumstances which would show how this information was obtained were not set out, the

officers acted on the information (believing from past experience that it was reliable) and obtained confirmation of the information by personal observation.

The assertion by affiants that Petitioner had purchased a Federal Wagering Occupation Stamp was evidence of a persuasive character that could not be ignored. For the affiants to ignore such information would have been a manifest dereliction of duty. All of these related facts were presented to a neutral and detached magistrate who then properly concluded that there was probable cause to believe that implements, devices, equipment and paraphernalia were kept in the premises in question for the purpose of gaming a policy game. *United States v. Ventresca,* 380 U.S. 102 (1965).

Respondent submits that there was substantial basis for the magistrate to conclude that gambling paraphernalia were probably present.

It is only necessary to show the probability, and not a prima facie showing, of criminal activity as the standard of probable cause. *Becker v. Ohio,* 379 U.S. 89, 96 (1964). The affidavits of probable cause should be tested by much less rigorous standards than those governing the admissibility of evidence at trial (*McCray v. Illinois,* 386 U.S. 300 (1967)), or the exactness required of an indictment.

This court, in *United States v. Ventresca,* 380 U.S. 102, 108 (1964) stated:

> "If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by

magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial offer before acting."

Petitioner attacks the honesty of the affidavit because of Officer Rundell's testimony that he thought some policy paraphernalia would arrive that afternoon, and therefore did not execute the warrant until later in the day. Why should this testimony lead to the conclusion that Officer Rundell's affidavit was made in bad faith? The officer testified that when he swore to that affidavit, he honestly believed that paraphernalia was present at that time (S.F. 26), and the evidence indicates that he was correct. That he expected additional paraphernalia to arrive later that afternoon in no way affects the honesty of the affidavit sworn to that morning. Petitioner's argument cannot be supported by the facts of this case.

## II.

## IT IS CONSTITUTIONALLY PERMISSIBLE TO USE THE FACT THAT PETITIONER HAS PURCHASED A FEDERAL WAGERING OCCUPATIONAL STAMP (26 U.S.C.A. (I.R.S. 1954) §§ 4401, 4411, 4412.) AS AN ELEMENT OF PROBABLE CAUSE IN THE SEARCH WARRANT AFFIDAVIT.

Petitioner was not charged with having failed to

purchase a Federal Wagering Occupation Stamp. No evidence was offered, in the state trial, which in any way tended to show that Petitioner had purchased a Federal Wagering Occupation Stamp. Unlike *Marchetti v. United States,* 390 U.S. 39, 88 S.Ct. 697 (1968) and *Grosso v. United States,* 390 U.S. 62, 88 S.Ct. 709 (1968) no substantial right guaranteed by the Fifth Amendment is involved in this case. In *Marchetti* and *Grosso* as well as in *United States v. Lookreits,* 398 F.2d 64 (7th Cir., 1968) and *Butler v. United States,* 361 F.2d 220 (5th Cir., 1966) the defendants were convicted because they had not purchased a Federal Wagering Occupation Stamp. Here, the magistrate who issued the search warrant and only the magistrate was made aware of the purchase by Petitioner of a Federal Wagering Occupation Stamp. Such evidence was never presented to the jury, nor may it be found anywhere in the record of this case other than in the affidavit examined by the magistrate.

That the Court did not intend to bar the collateral use of information that an individual had purchased a Federal Wagering Occupation Stamp is evident from the stated holding of the Court in *Marchetti* at page 61:

> "We hold *only* that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements."

Neither this Court nor any other court has applied the doctrine of *Marchetti* and *Grosso* in a collateral proceeding, and had this Court intended that it be so applied it would not have restricted its holding in *Marchetti.*

In *Gillespie v. United States,* 368 F.2d 1 (8th Cir.,

1966) the affiant testified that, beyond the recital of the affidavit, he had orally told the magistrate "that we had checked with Internal Revenue, and that Joe Gillespie had a current wagering stamp; . . ."

The Court found no difficulty in accepting the fact of Gillespie's possession of a wagering stamp as a circumstance to consider as a ground for a finding of probable cause.

While the court found there were not sufficient allegations upon which probable cause could be based in *Gillespie,* the importance of the decision rests in the court's determination that the possession of a wagering stamp was a demonstrable factor to be considered in measuring probable cause for the search warrant.

## CONCLUSION

For the reasons above stated, Respondent says that there is no violation of due process presented. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Gilbert J. Pena, Assistant Attorney General of Texas, certify that a copy of the foregoing Brief for Respondent in Opposition was served on the attorney for Petitioner, by depositing same in the United States Mail, postage prepaid, certified mail, addressed to Mr. James Edwin Smith, 1401 South Coast Building, Houston, Texas 77002, on this the ____ day of March, 1969.

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